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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 276

SERV-AIR, INC.,
Petitioner,

VERSUS

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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July, 1968

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I.
JURISDICTION

Petitioner, Serv-Air, Inc. invokes the jurisdiction of this Court by virtue of the provisions of Title 28, Section 1254, U.S.C.A., which provides:

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> "1. By Writ of Certiorari granted upon the Petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

II.
OPINION SOUGHT TO BE REVIEWED

This Petition for a Writ of Certiorari is taken for the purpose of procuring a review and it is hoped, a reversal of an opinion delivered by the Circuit Court of Appeals

for the Tenth Circuit (involving the question of enforcement of an order of the National Labor Relations Board), cited as *"Serv-Air, Inc.* v. *NLRB,"* — F.2d —, and a copy of which opinion is attached hereto, as Exhibit A.

III.
GROUNDS FOR JURISDICTION

Pursuant to Rule 23 of the Supreme Court, a concise statement of the grounds on which the jurisdiction of this Court is invoked follows:

1. The date of the decree sought to be reviewed, and the time of its entry are as follows:

Date of rendition of the opinion, January 19, 1968;

Date of entry, January 19, 1968.

2. Subsequent to said decree, a Petition for Rehearing was filed by your petitioner on March 8, 1968. On April 29, 1968, the Petition for Rehearing was denied by divided Court (2 to 1) with Justice Wilbur K. Miller dissenting. On April 29, 1968, the Circuit Court acting through Judge Jean Britenstein, entered its Order withholding a mandate for a period of 30 days which was to expire on May 28, 1968. Thereafter, and on May 28, 1968, an Order was entered by the Honorable Byron R. White, Associate Justice of the Supreme Court of the United States, staying the mandate, "pending the timely filing and disposition of a petition for a Writ of Certiorari."

3. The statutory provision which petitioner believes to confer on this Court jurisdiction to review said judgment or decree in question by Writ of Certiorari is as heretofore asserted, Section 1254, Title 28, U.S.C.A.

IV.
QUESTIONS PRESENTED FOR REVIEW

The questions presented for review by this Petition are as follows:

1. Was the "serious harm" posted by the Company non-coercive and protected by the "free speech provision" of Section 8(c); and by the free speech (First Amendment) provision of the Constitution of the United States?

2. Do the following communications issued to the Company by the Union during a strike constitute *unconditional* offers to return to work?

(a) "The Union is respectfully demanding that the company cease and desist these unfair practices and to allow all concerned to return to their jobs without any more retaliatory measures being taken against them because of their concerted actions."

and

(b) "The group desires to work but they want their legal rights respected."

3. Does the following communication constitute an "*unconditional* offer to return to work?"

"Be further advised that *they are interested* in returning to their jobs and remaining on their jobs as long as the Company does not create instances that would cause further disturbance."

4. "Whether or not a Company engaged in an extremely sensitive activity, such as the maintenance of multi-million dollar aircraft, must permit the adornment by employees of 'multiple-badges,' and 'pie plate' badges, and affixed 'streamers' to their apparel, resulting in diversion among employees, and in the hazard of possible injection of 'foreign objects' into

the mechanism of such aircraft, even though permitting the wearing of a single uniform union button? And whether or not the wearing of such multiple badges constituted a violation of a valid 'no-solicitation' rule."

5. "Whether or not an election petition circulated in one of the plant shops, simply seeking an election after one year of certification, was an unfair practice on the part of the employer, even though a supervisor participated in such circulation."

6. "Whether or not the employer was guilty of an unfair labor practice under Section 8(a)(3) and (1) of the Act, when, pursuant to a mandatory requirement by the Air Force that it must reduce its maintenance crew by eight men, it objectively selected the two crews consisting of four men each, who had the lowest record of productivity in the plant."

V.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

(a) With respect to the "serious harm notice" posted by the Employer in 1960, and held by the Court to be coercive (although the 4th, 6th and D.C. Circuits have held such notices to be well within the realm of the free speech doctrine), the following pertinent Article, Statute, and Regulations are quoted as follows:

(1) The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law * * * abridging the freedom of speech or of the press * * *."

(2) Section 8(c) of the Taft-Hartley Act adopted in 1947 provides:

"Section 8(c). The expressing of any views, arguments, or opinions or the dissemination thereof whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Sub-chapter, if such expression contains no threat of reprisal or force or promise of benefit."

(b) The *"serious harm"* notice posted by the Company in 1960 and maintained throughout, reads as follows:

"Since the Union has been putting on a campaign to get in here, some of you have been asking questions in regard to the following matters. We have decided to state the Company's position on these subjects as clearly as we can for everybody alike:

"(1) This matter is, of course, one of concern to the Company. It is, however, also a matter of serious concern to you and our sincere belief is that if this Union were to come into this Plant, it would not work to your benefit but to your serious harm."

VI.
CONCISE STATEMENT OF THE CASE

This case presents six grounds as above set forth for a review of the decision of the Circuit Court for the Tenth Circuit.

The petitioner here, Serv-Air, was petitioner in the Circuit Court, in which it sought a review of an order of the NLRB involving several issues. The Board filed a Cross Complaint, seeking enforcement. The Court overruled the Board on certain issues and overruled the petitioner, Serv-Air in certain instances.

It is only those issues which we deem to be of substantial importance which Serv-Air desires to submit to this Honorable Court for resolution.

There was no question concerning jurisdiction. Serv-Air, Inc. is a corporation which holds a contract with the United States Air Force, for the maintenance of the tangible facilities and the maintenance of a highly intricate powerful and complicated jet engine aircraft complex advanced Air Force Base at Enid, Oklahoma, which is one of the vital locations in the United States Air Force Training Command.

In the discharge of its duties, responsibilities and functions, it employs approximately 1,100 people on the Base. Of this number, only approximately 57 workers are members of the bargaining unit which was certified by the Board on June 12, 1964 as the "Fire Rescue Department." The relationship between these firemen "Smoke Eater's Lodge No. 898" (and the International Association of Machinists AFL-CIO) and this petitioner is the subject of the issues which were involved in the proceedings before the Board and before the Tenth Circuit. This case also involves certain other alleged activities of the Company with respect to other employees in the Maintenance Shops, but which were not certified as bargaining units.

A complaint was filed by the General Counsel concerning certain alleged unfair labor practices on the part of the Company. Hearings were completed before the examiner on April 8, 1965. The examiner rendered his decision on November 18, 1965. The decision was partly in favor of and partly adverse to this petitioner. Exceptions were taken and the Board rendered its decision (161 NLRB No. 17, dated October 25, 1966).

As to those issues which were decided adversely to this petitioner, a Petition for Review was filed with the Tenth Circuit. Briefs were filed. The case was heard before the Honorable Wilbur K. Miller, of the District of Columbia Circuit Court, Judge Britenstein, and Judge Seth, Circuit Judges.

On January 19, 1968, the Circuit Court rendered an opinion, sustaining in part and overruling in part the petition of Serv-Air, Inc. On March 8, 1968, the petitioner filed its petition for rehearing and on April 23, 1968, without argument, the petition for rehearing was denied by a divided Court (two to one) with Justice Wilbur K. Miller dissenting.

VII.
ARGUMENT

No. 1—The "Serious Harm" Notice

We first proceed to the "Serious Harm" notice.

This was promulgated in 1960 as disclosed by the record, and admitted by the lower court.

Not only this type of notice but the exact language thereof has been upheld by the 4th Circuit in *Wellington Mill Division, West Point Manufacturing Co.* v. *NLRB,* 4th Cir., 330 F.2d 579, *cert. denied* 379 U.S. 882; *Suprenant Manufacturing Co.* v. *NLRB,* 5th Cir., 341 F.2d 756 and *Amalgamated Clothing Workers of America* v. *NLRB,* D.C. Cir., 365 F.2d 898.

All of these decisions were cited to the Circuit Court in addition to:

—*NLRB* v. *Threads,* 308 F.2d 1 (4th Cir.).

It is noted that the 10th Circuit on this issue determined that while the notice is proper and was protected by Section 8(c) when adopted in 1960, "that conduct of the company in 1964 deprived it of that status."

In the Court's decision it mentioned three Circuit Courts which had held this type of free speech non-coercive, the Fourth Circuit, the Sixth Circuit and the D. C. Circuit, and in which cases the respective Courts differed with the Board. That in the atmosphere which existed in 1964, however, the notice "could well be considered as a threat of reprisal."

I am sure that this Court would welcome and consider the suggestion and information, that since the opinion of the Tenth Circuit was rendered on January 19th, there has been a radical departure on the part of the Board in its assessment of the validity of this type of notice, issued by the employer; and that there has also been another case decided by the Fourth Circuit reiterating its position that such notice *is* valid, notwithstanding attendant circumstances.

In the case of *Allied/Egry Business Systems, Inc.*, 169 NLRB 60 (CCH 22,089), decided January 30, 1968, the employer had issued a letter during an organization campaign stating:

> "your company stands very strongly against bringing this union into our plant. We feel that it would be a great mistake at this time, that it could not benefit you or the company and that it could quite possibly cause serious problems and harm to all of us."

In an additional letter during the organizational campaign in 1967 the employer injected the "serious consequences of

strikes and the strike record of the lithographers union." In another letter, is underscored the futility of choosing union representation. In another letter it affirmed the employer's "absolute right" to stand firm in negotiations, and asserted that while "the union can promise you the 'pot of gold at the end of the rainbow' it cannot guarantee you a single thing."

Other letters from the employer stated:

> "Promises of paid professional union organizers do not buy the groceries and clothing for your family or pay the loans on your home. Only the wages you earn from Allied/Egry do those things. And if this * * * union were to win the election there would still be only one way that it could try to force us to agree to any of its demands we thought unreasonable, or which we otherwise couldn't see our way clear to agree to THAT WOULD BE PULLING YOU OUT ON STRIKE. I can assure you that Allied/Egry has no intention of yielding to any such pressures as that—EVER."

It further refers to the reason for closing another plant belonging to the employer as being "another union's strike for 'unreasonable demands' and 'irresponsible goals.'" The union was then charged in the letter with having engaged in 58 strikes over the last three years.

After listing the possibility of permanent replacements and denial of employment benefits during the strike the letter concluded with:

> "Why gamble with your money and the security and the future of yourself, your loved ones, and your company by bringing this new militant international union into our plant and creating a situation that could

> lead to strikes and walk-outs. Such a gamble seems a bad one to me at a time when you and our Petersburg operation stand on the threshhold of what I consider a very bright future with our most experienced and able plant manager at the helm, and our long awaited plant expansion about to commence."

In a subsequent letter the employer claimed that the employees enjoyed:

> "Steady work and better wages and working conditions than anyone in Petersburg, since the plant opened,"

and countered with the question:

> "What would the story have been if you had been out on strike for several months during this time?"

In another subsequent letter employer pointed to strike violence and loss of jobs during a sympathy strike participated in by another local union.

He also stated that he would not give in "to strike pressure," and affirmed his legal right to replace economic strikers.

In one letter he also suggested possible union retaliation against employees; and in another letter asserted that the union was "out to get its hands on the employee's money."

In the face of all of these communications, it is interesting to observe that the Board has completely changed its position and issued its Order on January 30, 1968, holding that the "serious harm" notice and/or letter was still available to the employer as a right of free speech under

the Constitution and under Section 8(c). This, of course, was a drastic departure from its previous holdings in similar cases, where it had held that such notices, when considered in connection with incidents such as described in the *Allied/Egry* case, *supra*, became non-privileged.

It is interesting to note further that on January 12, 1968, the Fourth Circuit again in *Kayser-Roth Hosiery* (57 LC ¶ 12,472) (388 F.2d 979) reiterated its former position taken in *Wellington* (330 F.2d 579). *Threads, Inc.* (308 F.2d 1, 8).

It is therefore to be hoped that in the light of the definite change in stance taken by the Board on this issue, together with the additional decision rendered by the Fourth Circuit in the meantime, that this Court will accept the opportunity to reconcile the conflict which exists among Circuits with respect to the "serious harm" notice. See also *NLRB* v. *TRW-Semiconductors, Inc.* (9th Cir.), No. 21549 (1967), 56 LC ¶ 12,299, 385 F.2d 753.

The Tenth Circuit holds, however, that the Board has urged that this rule, which has been upheld by four Courts should not be applied in the instant case, and apparently relies upon the *Amalgamated Clothing Workers* case, *supra*.

The Court admits that the notice was proper and was protected by Section 8(c) when adopted in 1960, but that the "conduct of the company in 1964 deprived it of that status."

The only authority mentioned by the Court in support of this position is *Amalgamated Clothing Workers, supra*.

In that case, the Company, as the Court found, was guilty of certain other unfair practices, such as interrogation; but in *Amalgamated,* the Court still upheld the notice.

Here we have three Circuit Courts and four separate cases upholding the validity of the "Serious Harm" notice.

In *Serv-Air,* the 10th Circuit has disagreed in substance with three other Circuit Courts.

Its reliance on *Amalgamated, supra,* we must submit, is a nebulous and "quicksand" foundation for support.

We further submit that an employer under the First Amendment to the Constitution and under Section 8(c) of the Act, has the right to say what he wants to say about the Union, so long as there is no threat of reprisal.

Certainly there is no such threat contained in this notice; and the notice cannot be impregnated with any other unarticulated feelings of the employer—regardless of what they might be.

On this question alone, we submit that *certiorari* should be granted and the higher decision of the 10th Circuit reversed.

Nos. 2 and 3—Offers to Return to Work

Questions 2 and 3, although involving separate incidents, involve the same issue, to-wit: Whether or not the Communications presented to the Company, constituted *unconditional* offers to return to work.

The situation under the question presented under No. 2 was that the employees in the "Base Shop" had walked

out on September 3 which was on Thursday. On Friday, September 4, the Company received from the Union a telegram as quoted in "Questions Presented for Review" subparagraph 2(a). September 5 was Saturday, a non-working day. September 6 was Sunday, a non-working day. September 7 was Labor Day, a non-working day and September 8 was the first working day after offer to return. There were many preparations to be made if the employees were to return, after they had unceremoniously left their work; but they did return to work on September 9. The Board held and the Tenth Circuit agreed that the telegram of September 4 was an *unconditional* offer to return to work; and that the Company should have accepted them back that day, and would be liable for wages from September 4 until September 9.

It was and is the position of the Company that the telegram of September 4 was not an *unconditional* offer to return to work.

The acceptance of the terms of such an offer of course would mean that the Company was tacitly admitting:

(a) That it had committed any unfair practice;

(b) That it had taken any "retaliatory" measures against any of the employees.

The offer was therefore not absolute. It was not without reservation. It was not without conditions.

Consequently, it was not an unconditional offer.

The word "unconditional" is defined in Webster's 20th Century Dictionary unabridged, 2nd Edition, as follows:

"Without conditions or reservations; absolute."

The Board and the Court we submit were therefore in error in adjudging this employer to be liable for back pay, not only during the non-working days, but for any period from September 4 to September 9 for refusing to accede to this *conditional* offer to return.

With respect to the Question Presented for Review as No. 3, this also involved a communication which the Union contended constituted an *unconditional* offer to return to work.

The situation in this instance was that the firemen (who were members of the Union or the Fire and Rescue Department and which was a certified unit for the Company) had walked off the job on September 14. On September 15, the Company received a telegram from the Union as follows:

> "Be further advised that they are *interested* in returning to their jobs and remaining on their jobs as long as the Company does not create new instances that would cause further disturbance." (Italics ours.)

The same argument would apply to this telegram as to the one referred to in the preceding paragraph. The Union only stated that the people "are interested" in returning to their jobs. The Union did not state that they were offering to return to their jobs. The mere fact that a person might say to a salesman that he is interested in buying a car is certainly not an unconditional offer to buy a car. By no stretch of the imagination could this telegram be accepted as an *unconditional* offer to return to work, as we understand the law of contracts in this country.

Furthermore, by the acceptance of such an offer, the company would be in the position of admitting that it had "created" a present disturbance, and which could have been made to serve an unfair charge.

The company had not created this instance, and certainly it was not going to be placed in a position of having admitted that it had.

This was therefore not the type of unconditional offer to return to work which is contemplated under the decisions.

No. 4—The Badge Incident

This involved an incident relating to the wearing of multiple unorthodox badges by men in the engine maintenance section. As a result of this clownish episode, which occurred between October 19 and October 23, petitioner was obliged to terminate 16 men. These men later were accepted back to work by petitioner. The Board, however, has ordered that they be made whole for the time lost, holding that this Company had no right to restrict the number, size or appearance of these multiple badges. The decision of the Board was sustained by the Tenth Circuit.

In this case the company did not restrict the wearing of one ordinary conventional badge indicating union affiliation or any other affiliation. It did, however, and justifiably so, restrict the wearing of multiple badges which began to assume the proportions of a very difficult problem on or about October 19 and October 20. The people in the engine shops had not been certified as a bargaining unit; but they were apparently engaged in an organizing cam-

paign. The members of the union in the shops and certain employees of the company in the shops had been wearing a small single badge theretofore, evidencing the direction of their respective sympathies. It was felt by the company that one badge was certainly sufficient to announce to all the workers in the plant the attitude of the wearer toward the union. It was felt that so long as an employee was permitted to wear one badge disclosing his affiliation or his sympathy he was not being deprived of his right of free speech.

The turning point came, however, when the employees involved, began to make a mockery of the rules relating to appearance, discipline, interference with work, safety, and the No-Solicitation Rule, by wearing multiple badges consisting of various types and sizes, and even including certain home-made "pie plate" types of badges, and even large, taped-on signs across the back of their shirts or jackets. (See R. 1074.)

All of these antics distracted other employees from their work.

There was also the possibility of the injection of foreign objects into expensive and highly-sensitive aircraft motors being worked on (see Testimony of Major John C. Trobaugh, R. 99, *et seq.*, and Major Eugene Bartolich, Staff Maintenance Officer), who testified to what could happen to the blades in a compressor by the injection of even a small foreign object into the engine and who identified certain Exhibits 12(a) through 12(c), being actual photographs of engine blades which had been atrociously damaged by the injection of a foreign object, and which would endanger the life of a pilot.

The principal cases involving this type of multiple badge wearing are as follows:

—*NLRB* v. *Floridan Hotel of Tampa, Inc.*, 218 F.2d 545 (5th Cir. 1963);

NLRB v. *Essex Corporation*, 245 F.2d 589, 9th Cir.;

Murphy-Diesel case, 36 LC ¶ 65792, 263 F.2d 301;

NLRB v. *Harrah's Club*, 143 NLRB 1356, 337 F.2d 177 (1963).

It is interesting to note that one of the principal cases upon which the Examiner relied (*Fabri-Tek, Inc.*, 148 NLRB 156) with respect to the wearing of oversized badges, was later reversed by the 8th Circuit (352 F.2d 577).

This is a very analogous case, to *Serv-Air.*

Fabri-Tek was in the business of manufacturing magnetic memory devices for the computer or digital equipment industry. The finished product was extremely complex and each item must operate perfectly to enable the ultimate mechanism to function. It is also undisputed in that case that each step in the fabrication of a "memory frame" is done by hand and required a high degree of concentration during its performance. These intricate pieces were required to be absolutely "perfect." The intricacy of this work is analogous to the extreme precision work required on the workover of the aircraft engines at Serv-Air. A high degree of concentration, the Court found, "is required on the part of the employees and distractions of any kind might very well lead to inefficiency, work slowdown, and costly errors."

In the *Fabri-Tek* case, certain employees began to wear three types of buttons: one, a large round button of the type usually used in political campaigns, which apparently was very similar to one of the buttons constituting an exhibit in the *Serv-Air* case, about 3 inches in diameter; then, a square two-inch button; and, then the customary Union button. In addition to these buttons, there was a blouse being worn by some of the employees on which was stencilled on the back the words "Vote IBEW" in black, 2½-inch letters.

In the *Fabri-Tek* case, as in the *Serv-Air* case, management did not object to the wearing in an ordinary way of the customary Union button. However, when it became apparent that these multiple buttons and signs were being used for the obvious purpose of attracting the attention of other employees the Company issued a memorandum very similar to the Administrative Circular No. 9 introduced in evidence in this case, and appearing on page 23 of the Examiner's decision.

As in the *Serv-Air* case, *Fabri-Tek* also had in force and effect a long-standing "no-solicitation rule."

Just as in the *Serv-Air* instant case, *Fabri-Tek* contended:

(1) that the wearing of such multiple and unorthodox buttons and signs constituted a violation of its No-Solicitation Rule; and

(2) that the wearing of such oversized buttons produced a distracting influence which would affect the efficiency and the precision performance of the employees.

This case was tried before three eminent Circuit Judges of the 8th Circuit with Chief Judge Vogel writing the opinion, in which both Judge Mathes and Judge Ridge concurred.

In disposing of the issue as to whether the wearing of these oversize badges constituted "solicitation," the opinion stated:

> "We think that the wearing of the various oversize insignia was definitely a form of solicitation and campaigning in behalf of I.B.E.W., that that was the only meaning such type of insignia and activities could have had, and that it was in violation of the company's rule against soliciting or campaigning on company time."

In this connection, it will be observed, of course, from the recommended decision of the Examiner, that he very justifiably agrees with Serv-Air that its long-standing "No Solicitation" Rule was valid and enforceable.

Since Serv-Air did have a valid No-Solicitation Rule, in effect, then based upon this very recent and significant decision in *Fabri-Tek,* it must necessarily follow that the wearing of these oversized multiple badges and signs constituted a form of solicitation, and was in violation of our No-Solicitation rule.

The inescapable conclusion then is that we had a perfect right to discharge, lay-off, or terminate the sixteen people who declined to remove these emblems of solicitation.

In addition to that ground, it is obvious from the decision in the *Fabri-Tek* case, that we were also justified and

doubly justified in the lay-off or termination of these people by reason of the distractions caused by the wearing of such unorthodox symbols, on the ground that they constituted a special circumstance consisting of "distractions" to employees.

On this basis, the Court proceeded to state in the *Fabri-Tek* case:

> "As will be discussed in full, we further believe, however, that the company rule as written and enforced banning the wearing of unusual union insignia or usual union insignia in an unusual way is not in violation of the employees' rights under the act because of special considerations and circumstances present in this case, i.e., the importance of eliminating distractions to employees, which distractions could lead to a substantial increase in poorly produced memory devices."

It will also be recalled that in the record, there is testimony that some of the workers were carrying rolled-up newspapers with the word "SCAB" printed on it, obviously, flaunting them before some of the other employees.

In this connection, it is interesting to review the statement of the Court of the 7th Circuit (*Caterpillar Tractor Co.* v. *NLRB,* 230 F.2d 357):

> "We are of the opinion that petitioner's anticipation that the 'SCAB' buttons would prove disruptive of employee harmony in its plant and destructive of discipline in production was fully justified."

Also, in the case of *Republic Aviation Corporation* v. *NLRB,* 324 U.S. 803, the Supreme Court of the United States stated:

"The Act of course does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. *Working time is for work.* It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for discriminatory purposes." (Italics ours.)

The Court in *Fabri-Tek* thereupon continued:

"Clearly petitioner's rule against solicitations was not adapted for discriminatory purposes. The rule was solely designed to prevent distracting the attention of the employees during working time."

It is further interesting to note from *Fabri-Tek*, the quotation of the statement made by one of the witnesses which is almost parallel to the statement made by Mr. Hood, Vice-President and Operating Manager of Serv-Air, when the personnel manager told the witness as stated by her:

"It wouldn't make any difference whether we (Mrs. Heacock and another employee) were wearing non-union buttons or presidential campaign buttons or anything. He said he would have to ask us to take them off—no wheres on the premises."

In conclusion, the Court in *Fabri-Tek* stated:

"Considering the record as a whole, we believe that petitioner's prohibition of the use of the attention-attracting emblems during working time is an entirely reasonable exercise of its rights of management and employee discipline."

Here again, however, we have an instance of a decision of the 10th Circuit adverse to that of the 8th Circuit wherein the 10th Circuit holds (pages 15 and 16 of its opinion):

> "To the extent that *Fabri-Tek, Inc.* v. *NLRB,* 8th Circuit 352 F.2d 577-586, holds that badge wearing may be forbidden under a valid no-solicitation rule, we believe that it runs contrary to the *Republic Aviation* decision."

This matter we submit is a question which should be resolved once and for all by the Supreme Court of the United States.

No. 5—The Election Petition

The 10th Circuit admits that this is a "case of first impression."

The facts are that an election petition was circulated throughout the base employees long after one year subsequent to certification, and before any contract had been signed with the Fire and Rescue Department.

The base maintenance personnel and the jet engine maintenance personnel had never been certified as a union. An election had never been held for that group, since 1961, in which the Union did not prevail. There appeared to be some employees in favor of a union and some who were not. As a result there had been some discordance among the ranks; and the employees themselves decided to bring it to a head by circulating a petition for an election. One of the employees who appeared to have some supervisory status but certainly not in the higher echelon, apparently took some minor part in the circulation of the petition.

It was not a petition for decertification because there was no union in that group which had been certified. It was simply an application on the part of the employees to the Board to seek an election. It is unknown whether a majority were for the union or whether a majority were against the union. Enigmatically the District Director denied the petition; but the company was castigated by the union for even having a supervisor, unbeknownst to management, sign the petition and assume a very minor role in its circulation.

This petition and its circulation was stigmatized by the union and by the Board as being an unfair labor practice on the part of the company.

The Court concurred.

We submit that there is no law, and there is no valid rule or regulation which would preclude a minor supervisor from signing such a petition and participating to a limited degree in its circulation.

As the Court stated this is a matter of "first impression," and we submit should be decided by the Supreme Court.

No. 6—Jet Engine Reduction in Force

We would respectfully ask the Court to review the decision of the lower court relating to this incident.

It involves the question of whether or not the lay-off of eight men on November 6 on account of the necessary reduction in force, was on account of and by reason of their union activities; or whether it was a justifiable management decision.

It was the contention of the Government that the strict and literal results of the test given by the company were not followed; and that the lay-offs were therefore arbitrary and discriminatory, and on account of union activity.

We submit the testimony and the facts even as found by the Court do not justify this conclusion.

It will be noted from the testimony of Mr. Hill, the Director of Air Craft Maintenance at Vance, as reflected by the findings of the Examiner (page 27), that in the summer of 1965, it became obvious that the 100-hour inspections of the engines, could be increased to 200 hours of periodic inspection intervals. That on or about September 2nd a reduction in work force would therefore be in order.

It will be recalled that these same eight men, on September 3rd, including others, staged a "walk off."

These included Anson, Brockway, Brown, Edwards, Greer, Gooch, Kuhlmeier, Knowlton, Lankard, Kuberskey, Ming, Peckham, Payne, Ringgold and Scaia (Examiner's Decision, page 13).

If Mr. Hill or the company had any intentions of terminating these men or any of them, on account of union activity, they could have done so at that time because they already had notice of the necessary reduction in force.

On October 20th and 21st, when they walked off on account of the "badge incident," the company, if it had any intention of terminating them for union activity, could have done so and assigned as their reason a necessary reduction in force.

Orginally it appeared that there were 16 men who were destined to be laid off, but by November, attrition had taken care of eight of them; which left only a necessary reduction of eight men.

The company assiduously endeavored to retain as many of these people as possible, even though several opportunities obviously presented themselves for termination between September 2nd and November 6th.

We submit, therefore, it cannot be realistically contended that these people were laid off on November 6th for union activity. Had that been the reason, the company had more than two months between September 2nd and November 6th within which to separate them from company service. On the other hand, it is apparent from the record that the company continued to make overtures to the Air Force in a sincere effort to prevent the reductions.

This was a humanitarian act on behalf of the company, and certainly is not indicative of any animosities toward these people.

As to the objectivity of selection, we would urge the Court also to re-analyze the facts here.

It is true that individual surveys and appraisements were made of some 80 employees. It was also true that the company was faced with the task of accomplishing this reduction, so that the men who had to be released, would have the least effect upon the composite productivity and efficiency of the entire JEFM Plant.

The company therefore selected 14 men who had the lowest individual scores in the group, from which to select the eight men who had to be laid off.

Coincidentally, we think it significant to note that all of these 14 low men were people who had walked off the job on September 3rd and presumably were all union sympathizers. They included Brown, Edwards, Peckham, and Ringgold, who so far as the company knew were just as active union people as the others in the group.

In fact, it appeared at one of the meetings with Hill and Sprayberry that Ringgold was the spokesman.

Ringgold was not separated.

Brown was not separated.

Edwards was not separated.

Peckham was not separated.

Scaia and Greer were crew chiefs and each of them had three other men on his crew.

With reference to the production record of these two crews, Examiner found (page 32, Examiner's Decision) that *of all of the full crews* producing in the plant during July, August, September and October, the Scaia crew was the lowest producer in July, August and October, and the second lowest in September; and the Greer crew was the second lowest in July, third lowest in August, and lowest in September and October, tying with the Scaia crew for lowest in the latter month. These facts are not contradicted.

Based upon this completely unsatisfactory productivity record therefore, and since all of the men within those two crews were among the 14 lowest in the individual grading, it would appear to us that it was not only natural and realistic, but pratically mandatory that Mr. Hill and Mr. Sprayberry select these men for the layoff.

In the alleged segregation incident which occurred when the men came back to work on September 9th, the Examiner held and the Board sustained that the company had the right to separate and preserve the autonomy of these crews.

There was therefore nothing unusual nor reprehensible on the part of Mr. Hill and Mr. Sprayberry to select these eight men, who composed the two least productive crews in the plant, and who were among the low 14, to be laid off. In fact, it seems to us it was simply good managerial judgment.

We would hope the Court will re-examine the record and the circumstances involved in this November layoff, and either reverse, or remand for rehearing.

CONCLUSION

In conclusion we respectfully submit to the Court that this is a case which should receive serious consideration by this Court for the following basic reasons among others, to-wit:

(1). With respect to the "Free Speech" notice there is a definite conflict between the 4th Circuit and the 6th Circuit, on the one hand and the 10th Circuit on the other as reflected in this Petition.

(2). With respect to "MULTIPLE BADGES" there is a definite conflict between the 8th Circuit and the 10th Circuit which should be finally determined by this Court.

(3). With respect to the circulation of a petition for an election among a group of employees who have not been

amalgamated into a certified bargaining unit, it involves a case of first impression.

(4). With respect to what constitutes "an unconditional offer to return to work" it requires a determination.

(5). With respect to the manner in which a company may lawfully terminate personnel when faced with a mandatory reduction in force, it requires determination.

It is therefore respectfully requested that the Writ be granted.

Dated this 3rd day of July, 1968.

FRANK CARTER
Attorney for Petitioner

of Counsel:
OJTEN & CARTER
Bass Building
Enid, Oklahoma

July, 1968

(Proof of Service Attached Hereto)

SUPREME COURT OF THE UNITED STATES

NO. _____

SERV-AIR, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

TO: Marcell Mallet-Provost,
Counsel for Respondent.

You are hereby notified that a Petition for a Writ of Certiorari in the above entitled cause was filed in the Supreme Court of the United States on the _____ day of July, 1968.

A printed copy of the Record and a printed copy of the Petition and Brief are served upon you herewith.

_____
Petitioner

Service accepted this _____
day of _____, 1968.

_____
Counsel for Respondent

APPENDIX A

J-4939
Serv-Air, Incorporated

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 9193—JANUARY TERM, 1968

SERV-AIR, INC.,	)
	)
Petitioner,	)
	)
v.	)
	)
*NATIONAL LABOR RELATIONS BOARD,	)
	)
Respondent.	)

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

Frank Carter (Otjen, Carter & Huddleston, Of Counsel, were with him on the brief) for Petitioner

John E. Nevins, Attorney, National Labor Relations Board (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and Glen M. Bendixsen, Attorney, National Labor Relations Board, were with him on the brief) for Respondent.

Before WILBUR K. MILLER,* BREITENSTEIN and SETH, Circuit Judges.

* 10-CA-2122; 161 NLRB 17
Bendixsen/Nevins

* Of the District of Columbia Circuit, sitting by designation.

[APPENDIX]

BREITENSTEIN, Circuit Judge.

Serv-Air, Inc. (the Company), petitions for review of an order of the National Labor Relations Board[1] and the Board requests enforcement of its order. The Company is engaged in the operation and maintenance of all facilities and equipment used in the pilot training program at Vance Air Force Base and auxiliary fields near Enid, Oklahoma. It has about 1,100 employees. The International Association of Machinists (the Union) attempted to organize the employees. As the result of an election held on May 6, 1964, Smoke-Eaters Lodge No. 898, an affiliate of the Union, was designated as the representative of about 85 employees in Fire and Rescue Department of the Company. We are concerned with unfair labor practice charges which arose after that date and continued for a number of months. The charges, and the facts pertaining thereto, are so interrelated that an orderly presentation is difficult.

1. *The No-solicitation Rule.*

In November 1960, the Company posted a notice which stated among other things:

> "No person will be allowed to carry on Union organizing activities on the job. Anyone who does so and who thereby neglects his own work or interferes with the work of others will be subject to discharge."

On September 2, 1964, employees McCarty and Haley were discharged for violation of this rule. The fact that they engaged in conduct forbidden by the rule is not contested. The question is the validity of the rule. The Examiner upheld the rule and the Board reversed.

A no-solicitation rule which only regulates employee activity during working hours is valid unless adopted or used for a discriminatory purpose.[2] The Examiner found,

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[1] See 161 NLRB No. 17.

we believe correctly, that there was no evidence of discriminatory promulgation. The Board said that "no one disputes that the notice was initially promulgated in response to union activity." Standing alone, the fact that an organizational campaign may have begun before the rule was posted does not prove a discriminatory purpose. The rule was in effect for at least three and one-half years before any complaint was made. In effect, the Board infers from occurrences in 1964 that the Company had a bad motive in 1960. We do not deem this to be a reasonable inference.

The Examiner found no discriminatory application of the rule. He did so after denying a proffer of proof by the General Counsel that the rule had been applied discriminatorily. The Board held that the offer should have been received and we agree. The Board went on to hold that discriminatory enforcement was shown by the facts that the Company had condoned solicitations to pay for flowers sent to widows of deceased employees and had on one occasion discussed with a group of employees the handling of Community Chest and Red Cross contributions through payroll deductions. In our opinion, these beneficent acts fall far short of establishing forbidden discrimination.

The holding of the Board that the no-solicitation rule was discriminatorily promulgated and enforced in violation of § 8(a)(1) is reversed and the case remanded for such further proceedings as are appropriate on the issue of the allegedly discriminatory promulgation and enforcement of the rule. This requires that the Board decision that McCarty and Haley were discharged in violation of § 8(a)(1) and (3) be also set aside. If the rule was enforceable, the discharges were proper. Determination of the question of

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[2] See Republic Aviation Corp. v. National Labor Relations Board, 324 U.S. 793, 803-805; National Labor Relations Board v. American Coach Company, 10 Cir., 379 F.2d 699, 701; and National Labor Relations Board v. Shawnee Industries, Inc., 10 Cir., 333 F.2d 221, 225.

discriminatory discharge must await the reconsideration of the validity of the rule.

2. *The "Serious Harm" Notice.*

The printed notice which contained the no-solicitation rule included the following statement:

> "Since the Union has been putting on a campaign to get in here, some of you have been asking questions in regard to the following matters. We have decided to state the Company's position on these subjects as clearly as we can for everybody alike:
>
> (1) This matter is, of course, one of concern to the Company. It is, however, also a matter of serious concern to you and our sincere belief is that if this Union were to come into this Plant, it would not work to your benefit but to your serious harm."

Three circuits have held that this type of notice is non-coercive and is protected by the "free speech" provision of § 8(c).[3] The board urges that the rule announced should not be applied in the context of threats and other unfair labor practices. This distinction was suggested by the District of Columbia Circuit in Amalgamated Clothing Workers of America v. National Labor Relations Board, D.C. Cir., 365 F.2d 898, 910, and in our opinion is valid. Our view is that the notice was proper and was protected by § 8(c) when adopted in 1960 and that the conduct of the Company in 1964 deprived it of that status. In the atmosphere existing in 1964, the notice could well be considered as a threat of reprisal. The inference of the Board that the

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[3] See Wellington Mill Division, West Point Mfg. Co. v. National Labor Relations Board, 4 Cir., 330 F.2d 579, 583, cert. denied 379 U.S. 882; Surprenant Manufacturing Company v. National Labor Relations Board 6 Cir., 341 F.2d 756, 758-759; and Amalgamated Clothing Workers of America v. National Labor Relations Board, D.C. Cir., 365 F.2d 898, 909-910.

notice was then a threat violative of § 8(a)(1) is reasonable and the order will be enforced in this regard.

3. *Refusal to Reinstate Base Shop Employees after Strike.*

After the September 2, 1964, discharge of McCarty and Haley, some employees at the base shop walked out and were joined later by others. The strikers authorized a Union representative to make an unconditional offer to return to work on September 8. The Company did not permit them to return until September 9.

The question of whether we are concerned with an unfair labor practice strike or an economic strike is immaterial because no replacements were hired. The Company was obligated to reinstate the strikers when they unconditionally applied for reinstatement.[4] The question is whether the application for reinstatement was unconditional.[5] The offer to return to work on September 8 concluded with this language:

> "The union is respectfully demanding that the company cease and desist these unfair practices and to allow all concerned to return to their jobs without any more retaliatory measures being taken against them because of their concerted action."

After the Company refused to allow the strikers to return on the 8th, they sent a second message which, among other things said:

> "The group desires to work but they want their legal rights respected."

On September 9, they were all back to work.

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[4] National Labor Relations Board v. Fotochrome, Inc., 2 Cir., 343 F.2d 631, 633, cert. denied 382 U.S. 833.

[5] See National Labor Relations Board v. MacKay Radio and Telegraph Co., 304 U.S. 333, 345; National Labor Relations Board v. Fotochrome, Inc., supra note 4; National Labor Relations Board v. Brown & Root, Inc., 8 Cir., 203 F.2d 139, 147.

The Company says that the offer to return was conditional and that an acceptance would have been an admission by the Company that it had engaged in unfair labor practices. We do not agree. The offer was not conditioned upon any major concession such as a consent election or the execution of a contract and did not request any change in wages, hours, or working conditions. Of some relevance is the fact that on September 8 the strikers appeared for work at the normal hour and place.[6] The Company's reliance on American Ship Building Co. v. National Labor Relations Board, 380 U.S. 300, is misplaced. That case related to a lockout used as an employer weapon to strengthen its bargaining position after impasse in bargaining. The lockout here occurred because the Company did not like the terms of the application for reinstatement. An objective view convinces us that the application was unconditional and the lockout was impelled by a discriminatory motive.[7] The holding of the Board that the lockout violated § 8(a)(3) and (1) is affirmed.

4. *The Refusal to Reinstate the Firemen.*

On September 14, 1964, 57 employees of the Fire and Rescue Department walked off their jobs, assertedly because the Company had refused to hear certain grievances. On September 15 they notified the Company that they would return to work "as long as the Company doesn't create new instances that would cause another disturbance." On September 17 they presented an application suitable to the Company and were back to work on the 18th. The Company says that the September 15 notice was conditional and, hence, it was not bound to accept it. Here again the offer to return was not made contingent upon the

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[6] See Olin Industries, Inc. v. National Labor Relations Board, 5 Cir., 191 F.2d 613, 617, cert. denied 343 U.S. 919.

[7] See National Labor Relations Board v. R. C. Can Company, 5 Cir., 328 F.2d 974, 982.

grant of any concessions or benefits. For the reasons stated in regard to the base employees, we believe that the request for reinstatement was unconditional and the lockout on September 16 and 17 was discriminatory and a violation of the Act. This portion of the Board's order is affirmed.

5. *Discharges for Multiple-Badge Wearing.*

In connection with Union organizational activities Union adherents began to wear insignia signifying allegiance to the Union. These took various forms, such as pencils worn with a union clip showing, plastic badges, improvised badges pasted on plastic buttons, and signs attached to the back of a shirt or jacket. The Company countered with badges indicating that no union was wanted and distributed them to both employees and officials. Some employees then defaced and wore the Company badges. On October 15, 1964, Company supervisors began asking employees not to wear multiple badges. Between October 19 and 20, ten employees were clocked out for refusal to remove multiple insignia. On October 20, the Company posted a notice directing that only one badge be worn. In the next three days, 26 employees were terminated for violation of the notice. On October 27, the badge rule was suspended and everybody went back to work. The whole episode shows an immature approach to labor relations by both the Company and the Union.

The right to wear union insignia on the employer's premises during working hours is guaranteed by §7[8] in the absence of special considerations.[9] The Company says that special considerations justified its actions.

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[8] Republic Aviation Corp. v. National Labor Relations Board, 324 U.S. 793, 801-803.

[9] See National Labor Relations Board v. Essex Wire Corp., 9 Cir., 245 F.2d 589, 593; National Labor Relations Board v. Floridan Hotel of Tampa, Inc., 5 Cir., 318 F.2d 545, 548-549; and National Labor Relations Board v. Harrah's Club, 9 Cir., 337 F.2d 177, 180.

It first relies on the claim that the buttons were disruptive of harmony among the employees and, hence, under Caterpillar Tractor Co. v. National Labor Relations Board, 7 Cir., 230 F.2d 357, were excepted from the general rule. The Board correctly rejected the argument. The Company itself contributed to the disruption, if any, by distribution of its "no union wanted" buttons. The only showing of disharmony is the testimony of a supervisor without any enlargment as to the time, place, or circumstances of the disharmony. The Company's reference to the carrying by employees of rolled-up newspapers on which the word "scab" appeared is irrelevant because the multiple-badge rule in issue does not purport to cover such activities. The Caterpillar case, Id., 230 F.2d at 359, says that an employer may not restrict "passive inoffensive advertisement of organizational aims." The buttons with which we are concerned fall within this category.

The Company urges that the prohibition of multiple badges was proper to lessen the danger of foreign objects falling into jet engines. Fabri-Tek, Inc. v. National Labor Relations Board, 8 Cir., 352 F.2d 577, 586, holds that danger to plant processes can be a valid reason for restrictions on wearing of union buttons. The facts here do not justify the application of that principle. The Company permitted loose objects to be carried in the front pockets of shirts. It allowed multiple badges to be worn for about three months before taking any adverse action. It distributed its own badges. One employee discharged for violation of the rule pushed a lawn mower rather than repaired a jet engine. The Company fails to convince us that it had real concern over the foreign-object danger.

The Company contends that the rule was necessary in order that the employees present a responsible appearance to the Air Force instead of "looking like a bunch of clowns" because of all the badges. The argument that employees have no right to wear union insignia that are offensive to customers[10] does not apply here. The record shows that the

Company acted because of pique and not because of customer relations. It failed to take action against multiple badges for several months and contributed to the carnival atmosphere by the distribution of its own badges.

The claim that the badge wearing was a violation of the no-solicitation rule does not impress us. The courts have generally held that the wearing of union insignia is a form of expression protected by § 7 rather than a form of solicitation.[11] To the extent that Fabri-Tek, Inc. v. National Labor Relations Board, 8 Cir., 352 F.2d 577, 586, holds that badge wearing may be forbidden under a valid no-solicitation rule, we believe that it runs contrary to the Republic Aviation decision.

We agree with the Board that the multiple-badge rule violated § 8(a)(1) and that the discharges for violation of that rule discriminated against the affected employees in violation of § 8(a)(3).

6. *The Election Petition.*

Between October 1964, and January 1965, there was circulated among the employees a petition requesting that a representation election be conducted by the Board's regional director. Among others engaged in this activity were Klepfer and Huston. The Board finding that they were supervisors and that the Company was charged with responsibility for their acts accords with the principles which we stated in Furr's, Inc. v. National Labor Relations Board, 10 Cir., 381 F.2d 562, 565-566, cert. denied — U.S. —, and is supported by the record.

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[10] See National Labor Relations Board v. Harrah's Club, 9 Cir., 337 F.2d 177, and National Labor Relations Board v. Floridan Hotel of Tampa, Inc., 5 Cir., 318 F.2d 545, 549 (dissenting opinion of Judge Lewis).

[11] See Republic Aviation Corp v. National Labor Relations Board, 324 U.S. 793, 802 n. 7; National Labor Relations Board v. Mayrath Co., 7 Cir., 319 F.2d 424, 426; National Labor Relations Board v. Power Equipment Co., 6 Cir., 313 F.2d 438, 442.

The Company urges that the Union may not complain of an opportunity to participate in a free election to determine its status. The Board counters with the claim that Company solicitation of signatures to procure a certification election interferes with the employees' § 7 right to choose a union. Neither party supports its arguments by reference to any court decision on this particular point. Neither the rule that the Board will not conduct a representation election at a time when the employer is charged with an unfair labor practice which might affect the election outcome[12] nor the rule that an employer may not seek signatures for a decertification petition[13] is decisive under the facts presented.

Like many first-impression decisions, the choice here is difficult and requires consideration of general principles. A union organizational campaign is not carried to fruition overnight. It may continue for a prolonged period. If an employer may induce employees to call an election, it may be able to force an election on a union in the beginning of the campaign and before the union has a real chance to bring its views before the employees. Once an election is lost, the union may not seek another for one year[14] and is barred from organizational picketing for a like period.[15] The Act gives an employer no unrestricted right to secure an election.[16] When these considerations are viewed against a background of animus against the Union and a variety of unfair labor practices, an approval of Company solicitation of signatures to an election petition would per-

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[12] See Furr's, Inc. v. National Labor Relations Board, 10 Cir., 350 F.2d 84, 85.

[13] See National Labor Relations Board v. W. R. Hall Distributor, 10 Cir., 341 F.2d 359, 362.

[14] § 9(c)(3).

[15] § 8(b)(7)(B).

[16] See § 9(c)(1)(B).

mit the Company to profit by its improper actions.[17] We conclude that supervisory sponsorship of the election petition interfered with the employees' § 7 rights and violated § 8(a)(1).

7. *The Jet Engine Field Maintenance (JEFM) Layoffs.*

In 1964, it became apparent that the jet engines maintained by the Company would need servicing only half as often as was the practice theretofore. A new contract was negotiated between the Air Force and the Company. In November, eight employees engaged in the JEFM program were terminated. The Board does not dispute the fact that economic considerations caused the layoffs but says that those laid off were discriminatorily selected.

Before acting, Company supervisors made a comprehensive rating of affected employees on such bases as seniority, production, attitude towards supervision, and harmony with co-workers. The factors of attitude and harmony are paricularly sensitive when applied to leaders in an organizational campaign. Union activity does not entitle an employee to special immunity. At the same time such activity makes difficult the objective rating of any employee by an employer. All eight men laid off were Union stewards and had been prominent in the activities previously mentioned. An examination of the rating sheets shows that the scores were disregarded rather than applied. On the record presented we must accept the Board's conclusion that the true reason for the selective layoffs was the elimination of active union leadership and violated § 8(a)(3) and (1).

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[17] Cf. Franks Bros. Co. v. National Labor Relations Board, 321 U.S. 702, 704-705.

8. *The Chodrick Layoff.*

A reduction in the number of firemen was made necessary by the closing of Perry Field, one of the auxiliary bases. A rating system similar to that used for the JEFM workers was followed. The employees in the Fire and Rescue Department were represented by an affiliate of the Union and all were Union members. The layoff of Chodrick is said to be discriminatory because he was active in union affairs and had more seniority than some of those retained. No showing is made that seniority had to be observed in the layoffs. The claim of discrimination is not reasonable to us. All the firemen were Union members and necessarily those laid off belonged to the Union. Chodrick was reinstated when the first opening occurred. We conclude that the layoff of Chodrick did not violate § 8(a)(3) and (1) and that as to him the Board's order should not be enforced.

9. *Questioning of Employees and Disparagement of the Union.*

The Examiner credited testimony of employees that Company supervisors questioned them on their attitude towards the Union, inquired as to the identity of Union organizers and threatened their discharge, and said that union recognition would "jeopardize the jobs of" the plant employees. These occurrences are sufficient under our decisions in Betts Baking Co. v. National Labor Relations Board, 10 Cir., 380 F.2d 199, 201-202, and National Labor Relations Board v. Midwestern Instruments, Inc., 10 Cir., 264 F.2d 829, 831, cert. denied 360 U.S. 932, to sustain the Board decision. A review of the entire record convinces us that a violation of § 8(a)(1) occurred.

10. *The Refusal to Bargain.*

After the Smoke Eaters Lodge had been certified to represent the employees in the Fire and Rescue Department, the Company unilaterally changed the terms and

conditions of employment. Although admitting the § 8(a)(5) violation, the Company pleads that the order with reference thereto should not be enforced because it is now bargaining with the employees' representative. A sufficient answer is that compliance with a Board order is no defense to a petition for the enforcement of that order.[18]

The petition for review is granted and enforcement is denied on the item relating to the discharge of Chodrick. In regard to the no-solicitation rule, the petition is granted, enforcement is denied, and the case is remanded for such further proceedings as may be appropriate in the light of this opinion. See Ford Motor Co. v. National Labor Relations Board, 305 U.S. 364, 373. In all other respects the petition for review is denied and enforcement is ordered. A formal mandate shall issue in accordance with the views herein expressed.

The Company's motion attacking the costs of printing the additional material designated by the Board is denied. The Company has failed to convince us that the material so designated is immaterial. Further, after filing the motion the Company voluntarily deposited the estimated cost of printing the appendices. The Act of July 18, 1966, 80 Stat. 308, permits the taxing of costs to the prevailing party in a civil action brought by or against the United States after the date of the Act. The petition for review was filed December 12, 1966. In the circumstances the costs are taxed 85% against the Company and 15% against the Board.

Miller, Circuit Judge, dissents.

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[18] See National Labor Relations Board v. Mexia Textile Mills, Inc., 339 U.S. 563, 567, and National Labor Relations Board v. Local 101, International Union of Operating Engineers, 10 Cir., 315 F.2d 328, 331.